

**THE HIGH COURT
JUDICIAL REVIEW**

[2023] IEHC 478

[2022/70 JR]

BETWEEN

JENNY KILBRIDE

APPLICANT

AND

THE MARINE CASUALTY INVESTIGATION BOARD

RESPONDENT

JUDGMENT of Mr. Justice Charles Meenan delivered on the 28th of July, 2023

Introduction

1. These judicial review proceedings and earlier proceedings concern an investigation carried out by the respondent into an incident that took place on 13 September 2020 when a party of some 15 kayakers set off from Bullock Harbour to Dalkey Island, Dublin. This kayaking tour was organised by the applicant, who has over 20 years of experience in kayaking, having represented Ireland twice at international level and also having been an Irish team manager. As will be seen, the applicant disputes that any serious or potentially serious event took place that warranted such an investigation.

2. These judicial review proceedings came before the court on an *ex parte* basis and the court directed that the application for leave be on notice to the respondent. The respondent has filed a replying affidavit opposing leave and has also put before the court a “draft intended statement of opposition”.

3. Though legally represented in the earlier judicial review proceedings, the applicant represents herself in these proceedings. Although the applicant is fully entitled to represent herself, what she is not entitled to do, no more than if she was legally represented, is to seek some 68 declarations grounded on an affidavit that runs to some 232 paragraphs. This places an entirely unreasonable burden on both the court and the respondent. This is not a complex case and the manner in which it was pleaded by the applicant is entirely unacceptable.

Events of 13 September 2020

4. There is a complete dispute between the parties as to what occurred on the evening of 13 September 2020. For the respondent's version of events, I refer to a summary contained in the impugned report dated 26 October 2021:

“1.1. In the late afternoon/early evening of Sunday 13 September 2020, a party of fifteen kayakers (the Group) set out on a commercial sea kayaking tour. The intended plan was a return trip from Bullock Harbour to Dalkey Island.

1.2 - - -

1.3 The Group got separated; one small group (the small group) towards the north of Bullock Harbour and the second larger group (the large group) towards the north end of Loreto Convent.

1.4 Three separate members of the public placed 999 calls to emergency services between 19.03 hours and 19.14 hours to report kayakers in difficulty.

1.5 The small group comprised of two kayaks; a single kayak and a double kayak. Unable to cope with the waves which they encountered outside Bullock Harbour the small group drifted northwards. The single kayak was overturned by a wave and the participant was thrown out of the cockpit. The participant, with the aid of two instructors in two separate single kayaks, was able to get back into her kayak. However, she was thrown out a second time and on a second time assisted back into her kayak

and again thrown out, a third time. On the third occasion, this participant held onto the kayak in the water until a third instructor arrived and, assisted by one of the other instructors, who managed to put this participant back into her kayak.

1.6 Those on the double kayak (according to the participant) who formed part of the small group also went into the water and assistance was rendered by local fishers.

1.7 The participants in the small group were assessed by ambulance personnel onshore at Bullock Harbour. In the case of the single kayaker, this participant reports that she was advised by the ambulance personnel of their wish to bring her to hospital, due to their concern with the amount of sea water which she had swallowed but she declined their recommendation.

1.8 - - -

1.9 - - -

1.10 All participants and instructors were accounted for and made it safely back to shore.

1.11 - - - ”

5. The applicant’s version of events is set out in her grounding affidavit as follows:

“6. I say that on the balmy evening of 13 September 2020, a group of kayakers began to gather in Bullock Harbour, Dalkey at 5.30 pm to attend a routine kayak tour organised by my business. I say that the tour was interrupted by the sudden and uninvited arrival on the scene of the Irish coastguard service helicopter, the RNLI all weather lifeboat, the RNLI inshore lifeboat, two Irish coastguard land vehicles and an ambulance.- - - ” (emphasis added)

6. As can be seen, there is a fundamental dispute as to what occurred on 13 September 2020. In the course of this hearing I cannot resolve such a dispute. However, having considered the contents of the impugned report which sets out in detail the events that occurred and 999

calls that were made, I am entirely satisfied that there is considerable evidence that there was a “marine casualty” which warranted the commencement of an investigation pursuant to s. 26 of the Merchant Shipping (Investigation of Marine Casualties) Act 2000 (the Act of 2000). I accept it appeared to the Board of the respondent that there was an event or process to cause or pose the threat of death or serious injury to a person and/or loss of a person overboard which amounted to a “marine casualty” as defined by s. 2 in the Act of 2000. It should also be noted at this stage that in the earlier judicial review proceedings that the court (O’Regan J.) held that there was a basis for the investigation which resulted in the impugned report.

Earlier judicial review proceedings

7. On 4 January 2021, the applicant sought to judicially review the basis upon which the investigation was carried out by the respondent. The application came before O’Regan J. who delivered an *ex-tempore* ruling on 15 December 2021. Counsel’s note of this ruling is exhibited in the respondent’s replying affidavit to this application. The applicant has not questioned the accuracy of this note.

8. By the time the application came before O’Regan J. the impugned report had been completed and furnished to the applicant. Thus, the respondent argued in the earlier JR proceedings that the reliefs sought in respect of the decision to commence the investigation were now “moot”. This was not accepted by O’Regan J. who held that “some benefit could pertain for the applicant if she quashed the decision to launch the investigation..”. O’Regan J. held that:

“I am satisfied that this was not irrational, unreasonable or flying in the face of reason and common sense to determine a marine casualty occurred. It was well within the privilege of the Board to determine an investigation was warranted and feasible..”

O’Regan J. rejected that there was any want of fair procedures in carrying out the investigation. The learned judge also rejected the applicant’s submissions concerning the composition of the

Board of the respondent or that there was any bias in the investigation that occurred. The order of O'Regan J. was not appealed.

Current application

9. Although leave has not been granted to the applicant the respondent has, helpfully, referred the court to a “draft intended statement of opposition”. This document sets out the respondent’s reply to the multiple declarations being sought by the applicant.

10. Before considering the various criticisms which the applicant makes of the investigation report, it is important to underline the point that these are judicial review proceedings and not an appeal from the various findings set out in the report. The fact that the applicant disagrees with the findings of the report is not sufficient to grant leave. The applicant must establish that she has an arguable case and that the various findings in the report are irrational and/or unreasonable. For the reasons stated hereunder, I am satisfied that the applicant has failed to establish such an arguable case.

11. The applicant also questions the legal standing of the Board of the respondent and alleged bias on the part of the investigator. The applicant also makes reference to a lack of fair procedures. Some or all of these claims either have been made or could have been made in the earlier judicial review proceedings. It is not permissible for the applicant to raise issues in these proceedings that should have been or could have been raised in the earlier proceedings without good cause being shown. The applicant has sought to raise these issues without any such cause being shown.

12. The applicant’s criticisms in these proceedings of the following:

- (a) That the board of the respondent’s secretariat is unlawfully composed.
- (b) That the said board’s secretariat must be appointed by warrant.
- (c) That the investigator appointed by the board was biased.
- (d) That the investigator was unlawfully appointed.

(e) That the investigation was contrary to European law in particular Directive 2009/18/EC.

(f) That the investigation was tainted by predetermination.

These either were or could have been raised in the earlier proceedings which were dismissed by O'Regan J. In these circumstances it is not permissible to raise these issues in the judicial review proceedings now before the court.

13. There are a number of factual matters which the applicant takes issue with, namely, the weather and sea conditions at the time, use of VHF radio and whether there was a “small craft warning” in place at the time. It is clear that there was evidence on all these matters that is referred to in the report. As far as the weather was concerned the investigator had regard to Met Eireann forecasts and reports for the time and accounts of weather provided by witnesses who were present. As to use of VHF radios the investigator concluded that “it is not known whether VHF radios were available to or in use by the instructors” as for a “small craft warning” the investigator found that, as a matter of record, there was a small craft warning in operation at the beginning of the period of the tour in question set out. Though the applicant clearly does not agree with this aspect of the report, I am satisfied that she has made out no arguable grounds that such findings are irrational or unreasonable.

14. Prior the publication of the report the applicant was given an opportunity to make observations. Though some pages of these observations may have been omitted in the final report, such does not undermine the legality of the report, nor does the questionable quality of the photographs furnished by the applicant that were published.

15. The applicant makes reference to want of fair procedures as she did in her early judicial review proceedings. The applicant alleges that witness statements were withheld from her. This issue is dealt with at para. 44 of the respondent’s replying affidavit. It is stated that the investigator disregarded certain information contained in a third-party email as he considered

it to be of minimal probative value and, significantly, potentially prejudicial to the applicant. Excluding statements that may be prejudicial to the applicant could not be considered to be a breach of fair procedures. The aforesaid also applies to the “Sit Rep” information.

16. The applicant makes a number of claims under GDPR and has alleged breach of the European Convention on Human Rights. I cannot see that any issue with GDPR undermines the lawfulness of the impugned report. Nor can I see any breach of the European Convention on Human Rights. I am satisfied that the applicant has failed to identify any want of fair procedures on the part of the respondent who, at all stages, had regard to her involvement in the matters being investigated and was given every opportunity to make what submissions she wished to.

Conclusion

17. In the previous paragraphs I have set out what appear to be the main points of the applicant’s application for judicial review. The applicant has made multiple criticisms of various findings of fact in the impugned report and I am satisfied that she has failed to identify, even on arguable grounds, any findings that were irrational or unreasonable. The fact that the applicant does not accept these findings is not a sufficient ground for leave to be granted.

18. By reason of the foregoing, I am dismissing the application herein. As for costs, my provisional view is that as the applicant has been unsuccessful and that the respondent is entitled to an order for costs (to include reserved costs) be adjudicated in default of agreement. Should the applicant take issue with this I am directing that she lodge written submissions (not more than 1500 words) on or before 22 September 2023 and that any response from the respondent (again, not more than 1500 words) be filed on or before 13 October 2023. I will list the matter for mention before me on 20 October 2023.